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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-46

THE AMERICAN TOBACCO COMPANY, *et al.*,
Petitioners,

v.

JOHN PATTERSON, *et al.*

No. 76-56

TOBACCO WORKERS' INTERNATIONAL UNION, *et al.*,
Petitioners,

v.

JOHN PATTERSON, *et al.*

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR JOHN PATTERSON, ET AL., IN OPPOSITION

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Jurisdiction

The jurisdictional requistites are adequately set forth in the petitions.

Questions Presented

The American Tobacco petition presents the following questions:

(1) Whether the finding of the district court that the defendant company and union had engaged in unlawful discrimination on the basis of race was clearly erroneous.

(2) Whether front pay is a permissible remedy in an action under Title VII of the 1964 Civil Rights Act.

(3) Whether section 703(h) of Title VII protects a company rule prohibiting transfers between two plants even if that rule has the effect of perpetuating past discrimination.

(4) Whether the E.E.O.C. could maintain this action insofar as it seeks to remedy discrimination against female employees.

The Tobacco Workers petition presents the first two questions noted above, plus an additional question:

(5) Whether the International Union could be held jointly liable with its Local 182 for the proven unlawful discrimination.

Reasons for Denying the Writ

1. This is not, as the company suggests, a case in which the finding of discrimination was based solely "on statistics," or in which the defendants were directed to "achieve racial balance."

The determination of liability in this case was grounded upon a factual finding by both courts below that the defendants maintained specific employment practices which prevented black workers, originally assigned to low paying pre-fabrication jobs because of their race, from reaching the better paying fabrication jobs which they would have held in the absence of discrimination. These obstacles to the elimination of discrimination were (a) the utilization of unwarranted lines of progression, pursuant to which many junior whites enjoyed a preference for certain promotions over more senior and experienced blacks,[1] (b) a prohibition against transfers between a plant employing 45% of all black pre-fabrication workers and another plant, a block away, where 91% of all the high paying fabrication jobs and 90% of all whites were located,[2] and (c) the lack of definite job descriptions.[3] As a result of these obstacles, on December 31, 1973, five years after the defendants claimed to have reformed their seniority system "to permit all employees to compete equally," 90.7% of pre-fabrication workers were still black and 89.5% of fabrication workers were still white.[4]

The remedy ordered by the district court and upheld by the court of appeals was narrowly directed to these particular practices which had perpetuated the effects of past discrimination. Six of the nine lines of progression were eliminated, the no transfer rule was modified, and the defendants were required to post written job descriptions.[5]

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[1] Petition No. 76-46, pp. 8a-10a; Petition No. 76-56, Appendix A, pp. 25-26; Appendix B, pp. 57, 71-72.

[2] PX 21; Ex. App. 53, Brief for John Patterson, et al., Appellees and Cross-Appellants, p. A-8.

[3] Petition No. 76-46, pp. 6a-7a; Petition No. 76-56, Appendix A, pp. 23-25; Appendix B, pp. 58, 69.

[4] PX 51, Ex. App. 53, Brief for John Patterson, et al., Appellees and Cross Appellants, p. A-8.

[5] Petition No. 76-56, Appendix A, pp. 24-29.

This remedy removed barriers which have prevented blacks from reaching jobs which they would have held in the absence of discrimination. The defendants were not ordered to achieve any particular number of blacks or whites in any plant, department, or job.

2. Although there may in the past have been some uncertainty as to the availability of "front pay", that issue was definitely resolved by this Court in *Franks* v. *Bowman Transportation Co.*, 44 U.S.L.W. 4356 (1976).

Prior to *Franks* the only appellate case in which the availability of front pay was argued by the parties and expressly decided by the court was *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975). There the district court awarded back pay only for the period before its order modifying the defendants' seniority system; on appeal plaintiffs urged back pay should accrue until the date when each class member actually reached his rightful place. The Fifth Circuit concluded that back pay after the date of the injunctive relief (i.e. "front pay") was available under Title VII, but not necessarily required.

> Although logic may suggest that those two dates [the date when back pay ended and the date when the employee reached his rightful place] should coincide, we do not think that that result is required as a matter of law. We think that a court in equity, in framing its relief, is at liberty to do what the district court has ordered here. . . . On remand, the district court, may, if necessary, reconsider the back pay relief granted in light of the company's ability to date to find jobs for the discriminatees. 516 F.2d at 1266.

Although this Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), expressly disapproved of such broad

discretion in determining back pay claims, the panel in *Sabala*, handed down less than six weeks later, made no mention of *Moody*. In the other Fifth and Sixth Circuit decisions relied on by petitioners, the opinions refer to back pay periods which end prior to the date when all class members would reach their rightful place, but there is no indication that the plaintiffs there sought a longer period or that the court understood its language in this regard to decide a significant legal question.[6]

In *Franks* v. *Bowman Transportation Co.*, 44 U.S.L.W. 4356 (1976), all members of the Court agreed that Title VII required that victims of discrimination be made whole and restored to the economic position they would have enjoyed in the absence of discrimination. The question on which differing views were expressed was whether this should be done by injunctive relief, which under certain circumstances could have an impact on white non-victims, or by monetary relief, which would not. The majority concluded that, where constructive seniority would be sufficient to end at once all continuing effects of past discrimination, such injunctive relief was to be preferred. 44 U.S.L.W. at 4360-66. Front pay was expressly recognized as a possible alternative, 44 U.S.L.W. at n. 38. The Chief Justice expressed a preference for monetary relief in the form of front pay. 44 U.S.L.W. at 4367. Justices Powell and Rhenquist thought the question a matter of discretion for the trial court. 44 U.S.L.W. at 4366-4371.

The instant case presented a similar choice of remedies; for the future plaintiffs could be made whole either by immediately putting each in his rightful place and "bump-

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[6] See *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876-78 (6th Cir. 1973); *Meadows* v. *Ford Motor Co.*, 510 F.2d 939, 948 (6th Cir. 1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 258 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 (5th Cir. 1974).

ing" whites out of job they now hold, or permitting blacks to promote into the next vacancies which occur and compensating them for wages lost in the interim. The court of appeals preferred the latter remedy and directed modifications of the defendants' seniority and promotion system which should, in the long run, enable black employees to reach the positions they would have held in the absence of discrimination. As a practical matter, however, several years will elapse before all blacks arrive at their rightful places, and during this period those blacks will continue to earn less than whites of equal seniority solely as a result of past discrimination. The Fourth Circuit therefore properly concluded that additional monetary relief would be required to compensate blacks for such future losses. A "no front pay" rule, as urged by the defendants, would mean that Title VII *forbids* the courts from making whole employees for losses which will occur in future years. Such a prohibition would clearly frustrate the statutory purposes of Title VII. *Albemarle Paper Company* v. *Moody, supra.*

3. Section 703(h), relied on in the companies' petition[7] is of no relevance to this case. That section provides that the use of different employment conditions and rules at "different locations" is not unlawful unless "the result of an intention to discriminate."[8] The problem presented by this case is not that the practices at the Virginia and Rich-

[7] Petition in No. 76-46, pp. 3, 16-17.

[8] Section 703(h) of Title VII, 42 U.S.C. § 2000e(h), provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment . . . to employees who work in different locations provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin . . . ."

mond branches were different, but that the same form of discrimination was practiced at both.

During the period when most of American Tobacco's employees were hired, employees were segregated on the basis of race; the only jobs open to black applicants were in the poorly paid pre-fabrication department. The two "branches", located less than 1000 feet apart, differ in that pre-fabrication jobs constitute almost a third of the jobs at the Richmond Branch, but only one twentieth of the jobs at the Virginia Branch. As a result, although the Virginia Branch had 7 times as many employees as the Richmond Branch, half of positions historically open to blacks were restricted to the smaller Richmond Branch. Because of this policy of discrimination, blacks now constitute 41.2% of the employees at the Richmond Branch, but only 14.7% of the workers at the Virginia Branch. Over 90% of the higher paid fabrication jobs, and of the white workers, are at the Virginia Branch. Thus while almost half of the blacks are still locked into the poorly paid pre-fabrication jobs work at the Richmond Branch, 656 of the 718 high-paid fabrication jobs are at the Virginia Branch.[9] The district court properly concluded, in light of these facts, that the defendants' prohibition against transfers between the Virginia and Richmond Branches perpetuated the effect of past discrimination.[10] The company sought certiorari last Term regarding this same unlawful arrangement at two plants in Reidsville, North Carolina, *American Tobacco Co.* v. *Russell,* No. 75-1081; certiorari was denied. 44 U.W.L.W. 3593 (1976).

4. Any defects in E.E.O.C.'s administrative processing of the charge of sex discrimination have as a practical mat-

[9] Plaintiffs' Exhibit 21; Ex. App. 53.

[10] Appendix A, p. 27; Appendix B, pp. 96-97.

ter been rendered moot by the trial on the merits. Where such defects occur the remedy, in an appropriate case, is to defer judicial proceedings while the administrative processing is completed in the proper manner. This may be achieved by a stay, or by dismissal without prejudice, *E.E.O.C.* v. *Hickey-Mitchell,* 507 F.2d 944, 945 (8th Cir. 1974), and is intended to afford the defendant an opportunity to avoid trial by settling the case through "conference and conciliation" or by persuading the E.E.O.C. that there was no "reasonable cause" to believe there was discrimination. See 29 C.F.R. § 1601. In the instant case, even without such a formal deferral, the defendant had over a year between the filing of this action and the commencement of trial in which to settle the case or persuade the E.E.O.C. that its complaint was groundless. It would be manifestly pointless, at this late date, some two years after the trial on the merits, to stay or dismiss without prejudice the sex discrimination claim; the E.E.O.C., having prevailed at trial, will obviously not be persuaded at this juncture that there was no discrimination on the basis of sex, and would not settle for less relief than has already been ordered by the district court.

5. The Tobacco Workers' International Union and its Local 182, in a joint petition, urge the court of appeals erred in holding that the International was jointly liable with the Local for the union violations of Title VII. They urge that the Local acted strictly on its own and was "solely responsible" for any illegality in its dealing with the employer.[11] Since the Local and International are in agreement that the Local should bear all responsibility for union liability, there is no need for judicial resolution of this question. The sole effect of a ruling on this issue would

[11] Petition in No. 76-56, pp. 11-16.

be to allocate financial liability between the Local and the International; since plaintiffs have no interest in who pays the monetary compensation, and the defendant unions are in agreement, this aspect of the union petition presents no case or controversy.

The assertion of the International that it was in no way involved in the proven discrimination is not supported by the record. Prior to 1963 the International maintained segregated locals corresponding to, and supporting, the racially segregated departments.[12] The no-transfer rule and unwarranted lines of progression were expressly required by the collective bargaining agreements.[13] Those union contracts were negotiated by the officials and staff of the International.[14] The International reserves the power to approve or reject all collective bargaining agreements, and exercises that power through the International officials at the negotiations.[15] For its role in these negotiations, and other services, the International receives 60% of the dues paid by the union members at American Tobacco.[16] The finding of fact of the two courts below, that these circumstances warranted the imposition of liability on the International, is neither clearly erroneous nor of sufficient import to warrant review by this Court.

[12] App. 48.

[13] App. 50-51.

[14] App. 435, 521, 573.

[15] App. 521-22.

[16] App. 248-49.

CONCLUSION

For the foregoing reasons the petitions for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 1976, I served three copies each of the Brief for John Patterson, et al., In Opposition by depositing them in the United States mail, first class postage prepaid, addressed to -

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I further certify that all parties required to be served have been served.

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see

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